IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96CV01285 (RCL) (Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

DEFENDANTS' REPLY IN SUPPORT OF (1) MOTION FOR EXPEDITED CONSIDERATION; AND (2) MOTION TO COMPEL PLAINTIFF EARL OLD PERSON TO COMPLY WITH THE COURT'S DECEMBER 23, 2002 PRODUCTION ORDER AND TO APPEAR AND TESTIFY AT DEPOSITION

Defendants reply as follows to the Plaintiffs' Response ("Plaintiffs' Response") to Interior Defendants' Consolidated (1) Motion for Expedited Consideration; (2) Motion to Compel Plaintiff Earl Old Person to Comply with the Court's December 23, 2002 Production Order and to Appear and Testify at Deposition ("Defendants' Motion to Compel"); and (3) Memorandum of Points and Authorities in Support.

Introduction

Interior Defendants filed the papers identified above on January 16, 2003. Plaintiffs filed their Response on or about January 29, 2003. Plaintiffs' Response (at 1) incorporates by reference (1) Plaintiffs' January 8, 2003 filing, *Plaintiffs' Consolidated Motions to Modify or In the Alternative Stay the Production Order of December 23, 2002 as it Pertains Solely to Named Plaintiff Earl Old Person, Motion for Protective Order to Prevent the Deposition of Mr. Old Person and Memorandum of Points and Authorities in Support Thereof* (hereafter, "Plaintiffs'

Motion to Stay Discovery"); and (2) Plaintiffs' January 29, 2003 reply in support of Plaintiffs' Motion to Stay Discovery.

That reply by Plaintiffs further relies upon two other of their filings: (1) The January 8, 2003 motion by certain Plaintiffs to remove Earl Old Person as a class representative[1] (hereafter "Motion to Remove Earl Old Person"); and (2) Plaintiffs' January 29, 2003 reply in support of that motion.

The most significant point made in Plaintiffs' January 29, 2003 filings is their admission that Plaintiffs' attorneys faxed a copy of this Court's December 23, 2002 production order to Mr. Old Person, and they personally discussed that discovery and his noticed deposition with Mr. Old Person and his private attorney. See declaration of Dennis M. Gingold (at ¶¶ 10 - 12), attached to Plaintiffs' January 29, 2003 reply in support of their Motion to Remove Earl Old Person. Yet, Mr. Old Person still disobeyed the Court's order and the notice of deposition.

Argument

I. Plaintiffs Have Agreed to Resolving This Matter on an Expedited Basis

Plaintiffs' Response (at 1-2) states that, "[a]s for the expedited consideration aspect of defendants' motion, plaintiffs have no objection to the Court's resolving this matter on an expedited basis." Thus, the parties agree that expedited consideration is appropriate.

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[1] The full title of the January 8, 2003 Motion to Remove Earl Old Person is, *Motion of Elouise Pepion Cobell, Thomas Maulson, James Louis LaRose and Penny Cleghorn to Remove Earl Old Person as a Named Class Representative and Motion of Class Counsel to Withdraw From the Representation of Earl Old Person in Any Capacity Other Than as Class Counsel for a Member of the Certified Class.*

II. Because Plaintiffs Now Admit that Mr. Old Person Had Actual Notice of the Court's Order and the Scheduled Deposition, Immediate Compliance Should Be Ordered

There is no question that Mr. Old Person had actual knowledge of the Court's December 23, 2002 production order, and the scheduling of his deposition. See declaration of Dennis M. Gingold (at ¶¶ 10 - 12), attached to Plaintiffs' January 29, 2003 reply in support of their Motion to Remove Earl Old Person. He did not comply. Therefore, an order requiring immediate compliance is appropriate.

III. Plaintiffs Fail to Overcome Defendants' Showing That Discovery Is Appropriate

None of Plaintiffs' filings overcomes the clear showing made by Defendants' Motion to Compel and supporting memorandum that Plaintiff Earl Old Person should be required to submit to the Court's order for production of documents and to the notice of deposition. Plaintiffs' January 29, 2003 reply in support of their Motion to Stay Discovery (at 2-3) posits three scenarios: First, that the Court might simply grant the Motion to Remove Earl Old Person; second, that the Court might deny that motion without further discovery; and third, that the Court might require additional information before ruling on the Motion to Remove Earl Old Person. But regardless of which of those scenarios might occur, Mr. Old Person should be required to submit to the discovery at issue.

A. Even If Mr. Old Person Were Removed as a Named Plaintiff, He Still Should Provide the Discovery

Plaintiffs' January 29, 2003 reply in support of their Motion to Stay Discovery (at 2) first asserts that, if the Court were to grant the Motion to Remove Earl Old Person, then he would become an unnamed Plaintiff, and, they assert, "Defendants have not made any showing of a

need to depose unnamed class members."

Plaintiffs are incorrect. Defendants' January 16, 2003 Opposition to Plaintiffs' Motion to Stay Discovery (at 7-10) offers ample grounds under the facts and law for discovery of Mr. Old Person even if he were removed as a named Plaintiff. First, Plaintiffs fail to refute Defendants' argument (id. at 8) that the principal reason for not allowing discovery of unnamed class members in most instances is that they did not initiate the suit and have not actively participated in it and, therefore, should not face the burdens of discovery. Nor do Plaintiffs refute that such principle does not apply to Mr. Old Person, for he (along with the other named Plaintiffs) did initiate this suit, actively participated in it, and Plaintiffs' represented to this Court that he (along with the other named Plaintiffs) "can be counted on to see the job through."[2] Id. Thus, the principal ground for protecting unnamed class members from discovery does not exist with regard to Mr. Old Person.

Second, Plaintiffs fail to refute the authorities cited in Defendants' Opposition to Plaintiffs' Motion to Stay Discovery (at 8-9)[3] to the effect that discovery into class-related issues is appropriate, and this includes discovery into whether sub-classes should be formed. Nor do Plaintiffs overcome Defendants' showing that the unusual circumstances surrounding Mr. Old Person indicate that he may have information about whether antagonistic interests exist within the class.

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[2] See *Plaintiffs' Revised Memorandum of Points and Authorities in Support of Motion for Class Certification*, filed on or about January 14, 1997 (at 10).

[3] See Kamm v. California City Dev. Co., 509 F.2d 205, 210 (9th Cir. 1975), and Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978).

B. Plaintiffs Concede That if the Court Denies Plaintiffs' Motion to Remove Earl Old Person, Discovery of Him Remains Appropriate

Plaintiffs concede that if the Court simply were to deny their Motion to Remove Earl Old Person, then Plaintiffs' Motion to Stay Discovery "would be rendered moot" and they concede that the discovery of him then should go forward. See Plaintiffs' reply in support of Motion to Stay Discovery at 2-3. They add, however, that this should occur after he retains other counsel. Id. at 3. But that presupposes that the Court grants Plaintiffs' counsel's motion to withdraw, which, as Defendants pointed out in their prior briefs, should not be ruled upon until more information is obtained. Therefore, if the Court simply denies the Plaintiffs' Motion to Remove Earl Old Person, discovery should go forward with class counsel representing him, unless and until it is determined that Mr. Old Person desires or needs other counsel.

C. If the Court Determines That It Needs More Information Before Ruling on the Motion to Remove Earl Old Person, Then Full Discovery Should Take Place

The third scenario discussed by Plaintiffs is that the Court may conclude that additional information is needed before it is able to rule on their Motion to Remove Earl Old Person. Plaintiffs incorrectly suggest that discovery then should be limited to the reasons "why Mr. Old Person has not communicated with class counsel and his position on certain issues." See Plaintiffs' reply in support of their Motion to Stay Discovery (at 3). Plaintiffs cite no persuasive reason for such a limitation; on the contrary, such an artificial limitation would be counterproductive.

First, Plaintiffs assert that, after discovery as to Mr. Old Person's positions and attitudes about this case, the Court might decide to grant their motion to remove him as a class representative. See Plaintiffs' reply in support of their Motion to Stay Discovery (at 3). But as

discussed above, no valid grounds exist to exempt him from full discovery even if he were not a class representative. Second, if Mr. Old Person were only examined as to matters related to his willingness or fitness to be a class representative, and the Court then denied Plaintiffs' motion to remove him, Defendants then would have to conduct a second round of discovery of Mr. Old Person regarding the merits of the case. This would waste the time and resources of all concerned (a new trip for the deposition, new stenographer fees, and so on), and inevitably would delay the case while the second round of discovery were scheduled and then conducted. It would be much more efficient to hold a single deposition session (i.e., a day or consecutive days) to inquire into his attitudes about the case and his knowledge on the merits. Such a unified deposition would add little extra burden. The deposition sessions of most of the other named Plaintiffs regarding the merits lasted less than a full day each (and took less than two full days for the lead named Plaintiff). Thus, if Mr. Old Person must appear for a deposition anyway, little extra burden is added by his answering questions on the merits, just as the other named Plaintiffs did. Similarly, Plaintiffs fail to show that any undue burden would result from his being required to comply with the Court's December 23, 2002 order to produce documents.

Finally, Plaintiffs point to Mr. Old Person's "age and the burdens of travel," in asking that discovery take place on the reservation. See Plaintiffs' reply in support of Motion to Stay Discovery (at 3). Plaintiffs have failed to make the requisite showing of good cause that would justify such a request. As stated in 7 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 30.20[1][b][ii] (3d ed. 1997), "if the party deposed is a plaintiff or its agent, deposition is generally appropriate at the litigation forum" (id. at 30-35). Thus, "[b]ecause the plaintiff selects the forum for an action, as a general rule, the plaintiff is required to answer a notice of deposition

in the locality where the action is pending." Id. at 30-38. The commentators note, however, that this is a general rule which can be overcome if the plaintiff had no choice over where to file suit (id.) or "if plaintiff can show good cause for not being required to come to the district where the action is pending." 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2112 (2002).

Mr. Old Person fails to make such a showing here. Plaintiffs chose this forum and Plaintiffs proffer no evidence that Mr. Old Person is unable or would be unduly burdened to produce documents in and travel to Washington for the deposition. See Plaintiffs' reply in support of their Motion to Stay Discovery (at 3). Nowhere do Plaintiffs' papers state that Mr. Old Person has complained about the burdens of traveling off the Indian reservation on which he lives. Rather, Plaintiffs' reply in support of their Motion to Remove Earl Old Person includes a declaration by Plaintiffs' counsel, Dennis Gingold, but it raises more questions than it answers. That declaration (at ¶¶ 3-5 and10-11) confirms that Mr. Gingold has discussed the subject discovery with Mr. Old Person and Mr. Old Person's private attorney.[4] The declaration (at ¶ 4) also states that Mr. Old Person's private attorney "raised certain issues about the litigation," although it does not state what they were.

Conspicuously absent from Mr. Gingold's declaration is any assertion that Mr. Old Person resisted discovery because of his age, other personal circumstances, or the possible

[4] Mr. Gingold further states that he and his co-counsel, Mr. Harper, actually reached Mr. Old Person by telephone on December 23, 2002 and discussed (albeit briefly and not completed) the subject discovery required of him (Gingold Dec. at ¶ 10), and then reached him again by phone on December 26, 2002, although Mr. Gingold claims that Mr. Old Person would not talk to them then because his private attorney was unavailable. Id. at ¶ 11.

burdens of travel.[5] Mr. Gingold offers his own opinion that travel from the reservation is difficult (Gingold Dec. at ¶ 17), but that assessment proves little, as does Mr. Gingold's observation that Mr. Old Person is 73 or 74 years old (id. at 15) or that he suffered the loss of his wife (id.). The fact that counsel finds the trip difficult does not prove it too arduous a journey for the witness. The fact that Mr. Old Person may be 73 or 74 years old does not prove, without far more evidence, that he would be unduly burdened by a trip to Washington. Counsel's characterizations by themselves fall far short of demonstrating that Mr. Old Person would be unduly burdened by giving discovery here in Washington, where the case was filed. This is especially appropriate under the circumstances, in which the Court's December 23, 2002 order, and the duly served notice of deposition, were simply ignored.

Conclusion

For the reasons stated above, Interior Defendants respectfully request that the Court enter the order submitted with Defendants' Motion to Compel, requiring Plaintiff Earl Old Person to

[5] Mr. Gingold's declaration (at ¶ 12) is most notable for admitting that Mr. Old Person had actual notice of this Court's December 23, 2002 order. Yet, Mr. Old Person apparently chose not to comply with that order.

produce the required documents by a date certain, and to appear and testify at his deposition, under the possible penalty of contempt of court for non-compliance.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
DAVID J. GOTTESMAN
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dated: February 7, 2003

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 7, 2003 I served the foregoing *Defendants' Reply in Support of (1) Motion for Expedited Consideration; and (2) Motion to Compel Plaintiff Earl Old Person to Comply with the Court's December 23, 2002 Production Order and to Appear and Testify at Deposition* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

K. P. Kingston

Kevin P. Kingston